United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

75-7135

To be argued by
WILLIAM SCHURTMAN

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7135

WILLY DREYFUS,

Plaintiff-Appellant,

v.

AUGUST VON FINCK and MERCK, FINCK & CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REBUTTAL BRIEF OF APPELLEES AUGUST von FINCK AND MERCK, FINCK & CO.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLY DREYFUS, Plaintiff-Appellant,	:	
-against-	:	Docket No. 75-7135
AUGUST von FINCK and MERCK, FINCK & CO., Defendants-Appellees.	:	

REBUTTAL BRIEF OF APPELLEES
AUGUST von FINCK and MERCK,
FINCK & CO.

Defendants submit this brief to rebut the new arguments plaintiff has advanced in his reply brief, and to correct plaintiff's misrepresentations of defendants' positions.

For the convenience of the Court, defendants will address each of plaintiff's points in the order in which they are set forth in the reply brief, and will use the same captions as plaintiff.

Law of Nations

Plaintiff has completely misstated and distorted defendants' position on the applicability of the

law of nations. Contrary to plaintiff's contention, defendants never argued that only a state, and not its citizens, can enforce the law of nations.* Such an argument would be absurd, since 28 U.S.C. §1350 expressly confers jurisdiction on the district courts of actions by aliens (not foreign countries) injured by torts committed in violation of the law of nations.

What defendants actually asserted in their principal brief, and repeat herein, is that an examination of the cases construing the law of nations clause in §1350 demonstrates that while an alien has standing to sue under §1350, he must show that he has been injured by a violation of his nation's rights, since the law of nations is concerned with rights of nations, not individuals. See Khedivial Line, S.A.E. v. Seafarers' International Union, 278 F.2d 49 (2nd Cir. 1960) and the

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* The statement to which plaintiff apparently refers is contained in the following paragraph:

> "Scholarly commentary is not much more extensive, and centers primarily on the applicability of the law to nations, rather than to individuals. This is not surprising, however, since historically it was the state, and not its citizens, that asserted rights under the law of nations." (Appellees' principal appeal brief, pp. 26, 27) (emphasis supplied) (footnote omitted).

other cases cited and discussed by defendants in their principal appeal brief at pages 28 through 30.

Furthermore, defendants' position that the law of nations relates solely to the rights of nations is in no way inconsistent with defendants' arguments regarding treaties and the Act of State doctrine. In all three, defendants maintain that the courts have quite properly been most hesitant to find or enforce individual rights in the area of international law.

Defendants contend that plaintiff has failed to state a claim under a treaty of the United States because:

(1) defendants' alleged conduct did not violate any of the provisions of the cited treaties;

(2) none of the treaties on which plaintiff relies confers specific rights on private individuals; and

(3) this Court should not imply private rights of action under such treaties.

In so arguing, defendants are following a long line of cases (discussed in detail in defendants' principal appeal brief at pages 16 through 24) in which the courts, in recognition of the limited role the judiciary should play in the area of foreign affairs, have, for the purpose of determining which claims could properly be adjudicated, distinguished between treaties which, either by their express terms or reasonable implication, confer rights

on individuals, and those, like the treaties on which plaintiff purports to rely, which are either broad policy pronouncements or pacts regulating the relations of the covenanting nations with one another.

Defendants' Act of State arguments* similarly do not conflict with their law of nations contentions. Defendants maintain that the Act of State doctrine bars this Court from considering the validity of defendants' alleged actions because plaintiff has claimed that his property was taken from him as a result of actions taken and laws promulgated by the former government of Germany. This does not mean that defendants concede that such actions by the former government of Germany violated the Law of Nations so as to create a federal cause of action in favor of plaintiff under 28 U.S.C. §1350.

Defendants also do not claim that the Act of State doctrine applies <u>because</u> it involves the right of a nation to expropriate the property of an alien. Defendants' reference to the sensitivity of other nations

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* It was the plaintiff himself who raised the issue of the Act of State doctrine, in his principal appeal brief, at pages 37 through 40, despite Judge Brieant's explicit holding that he need not determine its applicability in this case. Apparently, plaintiff has had second thoughts as to the strength of his Act of State arguments, since plaintiff now urges this Court not to consider this matter on this appeal. See plaintiff's reply brief at page 10.

to suggestions that such expropriations are illegal was made solely to rebut plaintiff's contention that the Act of State doctrine should not be applied since "...the propriety of the type of confiscation involved in this case is no longer a matter of dispute, but has been 'universally condemned.'" (Plaintiff's principal brief, page 39).

Treaty Violations

Plaintiff's reliance on Barlow v. Collins, 397 U.S. 159 (1970), Association of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970) and Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir. 1968), all cited by plaintiff for the first time in his reply brief, is misplaced. They deal solely with the question of standing to sue under statutes, do not purport to establish rules for determining who may sue under treaties, and afford no support whatever for plaintiff's assertion (at page 5 of his reply brief) that:

> "The standard as to who may seek redress under a statute is equally applicable to suits for redress for violations of a treaty."

Treaties have long been recognized to be quite different from statutes, and in denying this, plaintiff ignores such cases as Edye v. Robertson, 112 U.S. 580 (1884), Z&F Assets Realization Corp. v. Hull, 114 F.2d 464 (D.C. Cir. 1940), aff'd, 311 U.S. 470 (1941), Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958), aff'd, 278 F.2d 252 (1960),

cert. denied, 364 U.S. 835 (1960) and People of Saipan v. United States Department of Interior, 356 F. Supp. 645 (D.Haw. 1973), and the principles recognized and codified in Sections 174 and 175 of the Restatement (2nd) of Foreign Relations (all discussed in defendants' principal appeal brief at pages 16, 17 and 18).

The aforecited precedents and authorities all reflect recognition of the limited role the judiciary should play in the area of foreign affairs. As the Supreme Court has stated:

> "A treaty is primarily a compact between independent Nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war." (Edye v. Robertson, supra, 112 U.S. at 598)

Plaintiff's argument concerning the meaning of Article 41 of the Regulations respecting the Laws and Customs of War on Land (the Hague Convention) is frivolous. The translation relied on by the district court and the defendants is set forth in the Statutes at Large, is the translation considered by the President and the Senate in determining to ratify it (36 Stat. 2277), and is reprinted verbatim in Bevans, Treaties and Other International

Agreements of the United States of America, a publication of the United States Department of State:

> "...signed to present in a convenient form the English texts or, in cases where no English text was signed, the official United States Government translation of treaties and other international agreements entered into by the United States from 1776 to 1950." (Id. at iii.)

Military Law No. 59

Despite all of plaintiff's protestations to the contrary, the federal courts have expressly declined to take jurisdiction over cases arising out of Executive Orders not specifically authorized by Congress. See Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973), McDaniel v. Brown & Root, 172 F.2d 466 (10th Cir. 1949) and Crabb v. Wedden Bros., 164 F.2d 797 (8th Cir. 1947) (discussed in defendants' principal appeal brief at pages 48 and 49).

Plaintiff's contention that the courts in McDaniel and Crabb "never considered the possibility that jurisdiction might exist under §1331 to enforce the Executive Orders there at issue"* is absurd. McDaniel specifically relied on Sweet v. B.F. Goodrich Co., 68 F. Supp. 782 (N.D. Ohio 1946), which held (at 782):

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* (Plaintiff's reply brief at page 8.)

> "The District Court is one of limited jurisdiction which the Congress can grant or take away. Jurisdiction is never a question to be left to doubt. If the Congress grants it it must appear by clear and unambiguous provisions. No grant of jurisdiction either directly or by delegation provides a forum here for violation of Executive Order No. 9240, 40 U.S.C.A. §326 note."

Executive Order No. 9240, it should be noted, was also the Executive Order in question in both McDaniel and Crabb.

In sharp contrast, this Court, in Murphy v. Colonial Federal Savings and Loan Ass'n., 388 F.2d 609 (2nd Cir. 1967), was dealing with an administrative regulation issued by the Federal Home Loan Bank Board pursuant to specific congressional authorization.

Consequently, plaintiff has still not cited a single instance in which a court has taken jurisdiction over a case arising under a regulation or an executive order, not specifically authorized by Congress.

While plaintiff now apparently concedes (plaintiff's reply brief at page 9) that MGL 59 contemplated that all cases arising under it would be tried solely in the courts established thereunder, he urges that this restriction be ignored since those courts are no longer in existence. In so doing, he completely overlooks the reason those courts were phased out in the early 1950s: Article 56 of MGL 50 specifically required that

all restitution cases be instituted on or before December 31, 1948. Since plaintiff commenced this action almost 25 years to the day after the last date for suit, he should not be heard to complain that he lacks a forum for his case.

Act of State Doctrine

As previously noted (supra, footnote, page 4), it appears that plaintiff now agrees with defendants that this Court need not reach the question of whether the Act of State doctrine bars this action. If, however, this Court should decide to consider the issue, then we submit that plaintiff's claims are indeed barred by the Act of State doctrine for the reasons set forth at pages 31-36 of our principal brief.

CONCLUSION

The decision of the district court to dismiss plaintiff's amended complaint should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York
That on October 21, 1975, he served 3 copies of Rebuttal Brief of Appellees August von Finck and Merck, Finck & Co.

on

John R. Horan, Esq.,
Fox, Glyn & Melamed, Esqs.,
Attorneys for Plaintiff-Appellant
299 Park Avenue,
New York, New York 10017

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Nathan Chambers

Sworn to before me this
21 day of October, 1975

JOSEPH STRINING
Notary Public, State of New York
No. 30-3878725
Qualified in Nassau County
Term Expires March 30, 1977